WILTSHIRE & GRANNIS LLP

April 23, 2012

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Level 3 Communications, LLC, Petition for Declaratory Ruling that Right-of-Way Rents Imposed by the New York State Thruway Authority Are Preempted Under Section 253, WC Docket No. 09-153, and

In re Acceleration of Broadband Deployment By Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting, WC Docket No. 11-59

Dear Ms. Dortch:

On April 19, 2012, Michael J. Shortley and Steve Gordon of Level 3 Communications ("Level 3"), and Madeleine Findley and I, on behalf of Level 3, met with Julie Veach, Diane Griffin Holland, and Marcus Maher, of the Office of General Counsel, Bill Dever, Claudia Pabo, Wes Platt, Deena Shetler, Tim Stelzig, and Matt Warner of the Wireline Competition Bureau, and Dan Abeyta, Don Johnson, and Jeffrey Steinberg of the Wireless Telecommunications Bureau. We discussed the attached decision and order in the pending litigation between the Level 3 and the New York State Thruway Authority ("NYSTA") in the United States District Court for the Northern District of New York. We also discussed the factual and procedural history of Level 3's petition for declaratory judgment and the FCC's Notice of Inquiry regarding public rights-of-way.

The NOI Confirms the Need to Clarify the *California Payphone* Standard, as the Commission and United States Indicated in Their Amicus Brief to the United States Supreme Court.

Level 3 reiterated the need for the FCC to clarify the applicable standard for public rights-of-way access under § 253. In particular, Level 3 stated that a significant number of its franchise or ROW access agreements will come up for renewal in waves over the next two to ten years. Delay in articulating a clarified standard governing ROW access charges will lead to tremendous regulatory uncertainty and impose dramatic costs on broadband service providers and nationwide broadband deployment efforts. Noting the differing interpretations of the FCC's

precedent in *California Payphone*, Level 3 urged the FCC to provide interpretive guidance so that parties seeking to deploy broadband using public ROWs could operate in an environment of greater certainty and so that courts could reconcile and balance the existing case law. As in its comments to the NOI, Level 3 noted that although many jurisdictions engage in reasonable practices, and that some have adopted best practices designed to facilitate broadband deployment,[1] best practices do not address the dysfunctional impact caused by the "outliers" – jurisdictions whose demands completely disregard reasonableness.[2] Section 253 addresses outliers that engage in unreasonable practices that thwart the ability of any entity to offer telecommunications services.

We discussed the importance of FCC action to ensure predictable, fair and reasonable access to ROWs in support of the Commission's national broadband goals. Specifically, as Level 3 has advocated in its filings in these dockets, the Commission should clarify that§ 253 requires preemption when a locality imposes payment or other material obligations that, if applied more broadly, would inhibit the delivery of telecommunications services.[3] Put another way, the *California Payphone* standard should be applied using a "practical effects" test, evaluating the effect of a public ROW charge if it was applied more broadly by a significant percentage of state and local governments.[4] Using *California Payphone* as the foundation and fine-tuning it with the approach employed by the First Circuit in *Guayanilla*,[5] the Commission can clarify the standard for determining when charges for access to rights-of-way are unreasonable and violate the second component of § 253(a), as follows:

> Charges for access to public rights-of-way, or other legal requirements, have the effect of prohibiting the provision of any telecommunications service by any telecommunications provider in violation of § 253(a) if they impose a franchise fee or rent (or other material obligation) that, if applied more broadly by a significant percentage of state and local governments, would materially inhibit or limit the ability of any competitor or potential competitor to offer telecommunications services or compete in a fair and balanced legal and regulatory environment.

Level 3 has also offered several ways to determine if a public ROW charge is presumptively reasonable, including whether the charge is based on recovery of the owner's incremental cost

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1 Reply Comments of Level 3 Communications, LLC, WC Docket No. 11-59, 1-6 (filed Sept. 30, 2011) ("Level 3 NOI Reply").

2 Level 3 NOI Reply at 6-13.

3 Ex Parte Letter of John T. Nakahata, Counsel to Level 3, to Marlene H. Dortch, FCC, WC Docket No. 09-153, 2-7 (filed Mar. 9, 2010) ("Level 3 March 2010 Ex Parte").

4 Comments of Level 3, WC Docket No. 11-59, 5-13(filed July 18, 2011) ("Level 3 NOI Comments").; Level 3 March 2010 Ex Parte at 2-7; Ex Parte Letter of John T. Nakahata, Counsel to Level 3, to Marlene H. Dortch, FCC, WC Docket No. 09-153, 1-2 (filed June 4, 2010); Reply Comments of Level 3, WC Docket 09-153, at 15 (filed Nov. 5, 2009) ("Level 3 Reply Comments").

5 *Puerto Rico Tel. Co., Inc. v. Mun. of Guayanilla*, 450 F.3d 9 (1st Cir. 2006).

for use of the ROW or on the non-monopoly fair market value of the land, such as would be assessed to a non-telecommunications user.

We also discussed the facts of the NYSTA dispute. As previously noted in the record, NYSTA holds a monopoly on ROW access to the longitudinal backbone running along the New York Thruway.[6] Once a provider has invested in acquiring capacity in the longitudinal backbone, it has no options except crossing the NYSTA-controlled land to reach the edge of the right-of-way. There is no alternative provider for these last few feet to the backbone. Economically, this is no different than the terminating access monopoly that the Commission has regulated for years.[7] NYSTA has—and has exercised—monopoly power to demand outrageous rents from Level 3 or any other provider seeking to access the public ROW.[8] The fact that neither Level 3 nor, by NYSTA's admission,[9] any other provider has added new access points highlights that NYSTA's exercise of market power deters the deployment of new lateral connections.[10]

Additional elements of the Riders underscore their unreasonableness and the extent to which they discourage additional use that places no additional burden on the right of way. NYSTA's rents for POP connections (as opposed to regeneration facility connections) are calculated on a per-fiber basis at $400 per fiber for the first 96 fibers. This formula applies to each fiber installed, whether lit or not. By itself, this significantly burdens new lateral connections because demand is far below 96 fibers; indeed, Level 3 averages only 62% lit fibers on the seventeen access connections covered by the Riders.[11] But if Level 3 lights the 97th (and any additional) fiber, NYSTA's fees then escalate an additional $333 per fiber.[12] This occurs even though Level 3 places no additional burden placed on the right-of-way – the first 96-strand fiber is already be in place, and, in any event, the conduit space is Level 3's vacant space. All that changes from the ROW perspective when Level 3 lights additional fibers is that more flashes of light representing bits are being transmitted. NYSTA's per-fiber charge is effectively a tax on the use of increased broadband capacity that directly undercuts the Commission's efforts to promote broadband with no justification other than to extract a revenue share from the telecommunications provider.[13] We also discussed the fact that NYSTA's argument that laterals

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6 Level 3 Reply Comments at 7-8.

7 In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers, CC Docket No. 96-262, Seventh Report & Order, 16 FCC Rcd. 9923 (2001).

8 Level 3 Reply Comments at 17-20; Level 3 March 2010 Ex Parte at 5-6; Comments of Verizon & Verizon Wireless, WC Docket No. 11-59, 39-41 (filed July 18, 2011).

9 NYSTA Opposition to Level 3 Petition for Declaratory Ruling that Certain Right-of-Way Rents Imposed by the New York State Thruway Authority are Preempted Under Section 253, WC Docket 09-153, Ex. 2 ¶ 7; *see also* Level 3 Reply Comments at 15-17.

10 Level 3 Reply Comments at 8 & n.32.

11 Level 3 Petition for Declaratory Ruling, WC Docket No. 09-153, 18 (filed July 23, 2009) ("Level 3 Petition").

12 Level 3 Petition, Ex. 24 at B.1.

13 Level 3 Reply Comments at 11-14.

burden the longitudinal backbone is sheer nonsense: transmitting additional light flashes over the longitudinal backbone imposes no increased burden to the rights of way underlying the backbone.

The Commission has several tools at its disposal to clarify the standard for determining when unreasonable ROW charges constitute an unlawful barrier to providing telecommunications services, and thereby to address the problem of public rights-of-way outliers that impede its national broadband goals. It can issue a declaratory ruling on Level 3's pending petition with a clarifying standard for determining presumptive reasonableness of ROW charges. It can issue interpretive rules, clarifying how § 253's reasonableness standard is to be construed and applied. It can issue legislative rules, via a Notice of Proposed Rulemaking. It could also file an *amicus* brief with the Northern District of New York. Each of these alternatives would be entitled to deference under *Chevron v. NRDC*,[14] and could promote greater uniformity and better reflect the Commission's broadband deployment priorities than continued ad hoc litigation. As a result of Level 3's petition and the NOI, the Commission has sought and received exhaustive comment on the issues before it. To that end, it is not clear that issuing an NPRM would result in any additional useful information.

Northern District of New York Litigation.

Level 3 discussed the recent decision and order from the Northern District of New York, denying NYSTA's motion for summary judgment on its claim that § 253(a) did not apply to the Riders, and denying Level 3's affirmative defense of economic duress to NYSTA's breach of contract claim. Level 3 noted that although the district court denied the particular technically defined defense of economic duress, it also denied NYSTA's claim that Level 3 should be estopped from challenging the validity of the Riders under § 253, stating that "contractual estoppel may not be used to enforce a contract that is illegal or against public policy."[15] Read together, these holdings illustrate the narrowness of the court's opinion and underscore the obstacles NYSTA will have to overcome in order to prove that its punitive ROW rents do not violate § 253.

Level 3 further noted that even if the court were to conclude that Level 3, with respect to those access points already constructed, is stuck with the bad contract under which Williams lived, a Section 253 issue would continue to exist as to new access points and lighting additional fibers. New access points are not governed by any prior contracts, as they would require an entirely new contract. The foreclosure of new telecommunications services through new access points is entirely a Section 253 issue, and not at all a contractual one.

In addition, Level 3 also stated that at the time Williams negotiated its longhaul agreement with Adesta, the customary practice with respect to rights-of-way was that the right-of-way to the longitudinal fiber included lateral access. Accordingly, at that time, it was not

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[14] 467 U.S 837 (1984).

[15] *N.Y. State Thruway Auth. v. Level 3 Commc'ns, LLC*, No. 10-CV-0154, slip op. at 16-17 (N.D.N.Y. Mar. 30, 2012).

ordinarily viewed as necessary to provide separately for lateral access rights in the longitudinal fiber right-of-way agreement.

Sincerely,

John T. Nakahata
Counsel to Level 3 Communications

cc: Julie Veach
Diane Griffin Holland
Marcus Maher
Bill Dever
Claudia Pabo
Tim Stelzig
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